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Examining South Africa's National Rape Crisis and its Legislative Attempt to Protect its Most Vulnerable Citizens

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NOTES

Endangered Species: Examining South Africa's National Rape Crisis and its Legislative Attempt to Protect its Most Vulnerable Citizens

ABSTRACT

With the demise of apartheid, South Africans eagerly anticipated the freedom from bondage that liberation brings. More than ten years later, however, remnants of the inhumane system still remain throughout South Africa, with the epidemic rape crisis that currently grips the African nation providing dramatic evidence of the continued hold of apartheid. Scores of South Africa's women and young children must contend with the pervasive sexual violence that permeates the country. These would-be victims live in constant fear of physical attack, while advocates await the South African government's response to this national crisis. Unfortunately, legislation that would dramatically change South Africa's current sexual assault laws remains stalled before the South African Parliament almost a decade after its proposal. Further, South Africa's leadership has attempted to shift the focus from the rape epidemic to racism, leaving countless numbers of women and young girls to contend with almost daily violence. The Author argues that the rape crisis demands an immediate response from the South African Government and advocates for the swift passage of the Sexual Offences Bill. The Author recommends, however, that a number of modifications be made to the proposed bill in order to ensure the effectiveness of the legislation. These modifications include: (1) expansion of both the bill's definition of rape and the available defenses; (2) the creation of certain evidentiary rules; and (3) inscription of a written policy into the bill that gives sexual assault victims access to antiretroviral drugs.

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I. INTRODUCTION

The year 1994 was a triumphant one for black South Africans. The abolition of apartheid and South Africa's first democratic election infused black citizens with a feeling of hope and the promise of equal

opportunity.¹ More than ten years later, many black South Africans are still living with the scars of their painful past.² Just as slavery continues to permeate the fabric of U.S. society, apartheid has left an indelible mark on the hearts and minds of South African's black citizens.³

As black South Africans struggle to break free from the chains of their past, "[o]ne of the most profound legacies of apartheid" continues to keep them bound: the legacy of sexual violence against women.⁴ In post-apartheid South Africa this violence has reached epidemic proportions⁵ with the severe targeting of young South African girls serving as an extreme example of the depths of this violence.⁶ One scholar writes that "[a]ll over the world, the adolescent girl is the girl whose body is most at risk."⁷ Everyday, countless South African girls experience this risk "in communities where they live in constant fear of physical attack."⁸ Statistics show a 400% increase in child rape in the past eight years.⁹ Both young girls and women alike not only must face the emotional and physical scars that result from a sexual assault but also the prospect of death: on average, 45% of those arrested on charges of rape in South Africa test positive for HIV or AIDS.¹⁰

In light of this epidemic, many are looking to the South African government to enact legislation to combat the phenomenon.¹¹ Unfortunately, the legislation that advocates seek has been in limbo

1. Stephanie Nolen, *In South Africa, 60 Children a Day Are Raped*, THE GLOBE AND MAIL, Oct. 18, 2003, at F1, available at 2003 WLNR 14083108.

2. See Nick Childs, *South Africa Concludes Healing Process*, BBC NEWS, May 31, 2001, available at <http://news.bbc.co.uk/2/hi/africa/1363184.stm>.

3. See Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 432 (1999).

4. *Id.*

5. *Id.* at 433; Lloyd Vogelmann & Sharon Lewis, *Gang Rape and the Culture of Violence in South Africa*, (1993), <http://www.csvr.org.za/papers/paplvsl.htm>.

6. Alexandra Zavis, *Rights Group Says HIV Prevention Program Fails South African Rape Victims*, THE CANADIAN PRESS, Mar. 4, 2004, available at <http://www.aegis.com/new/ap/2004/AP040305.html>.

7. Oluyemisi Bamgbose, *Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl*, 10 U. MIAMI INT'L & COMP. L. REV. 127, 127 (2001-02).

8. Andrews, *supra* note 3, at 433.

9. Megan Lloyd Davies, *Fighting the Child Rape Epidemic*, WESTERN DAILY PRESS, Apr. 8, 2003, at 4.

10. Nolen, *supra* note 1.

11. Davies, *supra* note 9 (discussing Childline's call for a Child Justice Bill); Zavis, *supra* note 6 ("Without urgent government action . . . the dual epidemics of HIV/AIDS and sexual violence will continue to claim the lives of too many South Africans.").

before the South African Parliament for nearly ten years.¹² If enacted, the Criminal Law (Sexual Offences) Amendment Bill (Sexual Offences Bill) would dramatically change South Africa's current law regarding sexual assaults.¹³ Many, however, question whether the legislation will effectively protect women and young adolescents from becoming victims of rape or adequately deter would-be rapists and sexual predators.

Part II of this Note discusses how the legacy of apartheid has contributed to the sexual violence that pervades South Africa. Part III examines the Sexual Offences Bill currently before the South African Parliament and the challenges faced by the South African government in using the law to correct a societal ill. Part IV will examine whether the United States' Violent Crime Control and Enforcement Act of 1994 can serve as a model for South African lawmakers. Finally, Part V will propose modifications that should be made to the Sexual Offences Bill to ensure that the legislation brings about the change that South Africans seek.

II. BACKGROUND

A. *The History of Apartheid as Experienced by the Women of South Africa*

Though much has been written about apartheid, only a small percentage of this vast scholarship has focused on apartheid's lingering effects upon women and children. Therefore, to understand the significance of the Sexual Offences Bill and the meaningful impact it could make in the lives of women and young girls across South Africa, the Author will provide a brief synopsis of the history of apartheid, specifically focusing on its effects on women.

The patriarchal legal structure that existed during apartheid relegated black women to a subordinate class within society.¹⁴ The laws did not permit women to rent or own a home, retain custody of their children upon divorce, or obtain an education.¹⁵ Further, the South African culture reinforced these inequities.¹⁶ Women were

12. Email from Kristin Fleschner, 2004–05 Traveling Fellow, Vanderbilt University, to Ashley J. Moore, Executive Student Writing Editor, Vanderbilt Journal of Transnational Law, Vanderbilt University Law School (Jan. 29, 2005, 11:11:38 PST) (on file with author).

13. Wyndham Hartley, *Where Justice is More Than Just a Word*, BUS. DAY (S. Afr.), Feb. 2, 2004, available at 2004 WL 65460665.

14. Andrews, *supra* note 3, at 430.

15. *Id.*

16. *Id.*; Bamgbose, *supra* note 7, at 129 ("African culture, in particular incorporates things pre-colonial, colonial and contemporary as well as things social,

taught not to question "the fundamental logic of such gender inequality,"¹⁷ and the operation of laws such as those mentioned above ensured that women would never attain equal status with men.¹⁸ Since the abolition of apartheid, women have made great societal strides, garnering freedoms that previously did not exist for them. Their place in society has changed dramatically with the institution of a government affirmative-action program¹⁹ and the grant of greater legal power.²⁰ Many argue, however, that despite these advancements, black women continue to face societal gender inequality.²¹

This system of inequality not only relegated women to a subordinate role in society, but "render[ed] [them] exceedingly vulnerable to physical and other forms of violence."²² For instance, during the apartheid years, and still today, women and girls residing in black townships lived with the fear of being "jackrolled."²³

When you leave your child alone in the home she is not safe. And in the street she is not safe. And in the car she is not safe. There is nowhere that she can walk and be safe. Girls are afraid somebody in a car will stop them and say, "get in." When they walk in the street they are [publicly] raped by men with guns. Sexual abuse happens so much that some students stop going to school. A sinister spin-off of "jackrolling" is that is it considered by some not to be a crime, but "just a game."²⁴

In situations like the one described above, groups of adolescent men would abduct and gang rape their victims, making no attempt to shield their faces or hide their identities.²⁵ The violence continued unabated for so many years because South Africa's law enforcement

economic, and political. It is apparent that there is a relationship between the law and culture of the people. Society has a cultural connotation, which is relative to that society.").

17. Andrews, *supra* note 3, at 430.

18. *Id.*

19. Nolen, *supra* note 1.

20. Andrew Maykuth, *In Raped-Scarred Nation, An Insurance Plan*, THE PHILADELPHIA INQUIRER, Oct. 16, 1999, available at <http://www.maykuth.com/Africa/rape1016.htm>.

21. *Id.*

22. Andrews, *supra* note 3, at 432.

23. Nolen, *supra* note 1; Vogelmann & Lewis, *supra* note 5.

The word 'jackroll' was coined to refer to the forceful abduction [and rape] of women in black townships by a specific gang called the 'Jackrollers' which operated in the years 1987/1988 in the Diepkloof area of Soweto As the abduction of women became fashionable however, anyone who did it could be called a jackroller, and 'jackroll' became a commonly used verb in the township vocabulary.

24. Andrews, *supra* note 3, at 448-49.

25. Vogelmann & Lewis, *supra* note 5.

did not police the black communities.²⁶ The main objective during apartheid was to stifle political dissent and keep the black communities under the police's dominion and control.²⁷ The politics of the day seemed to invite violence against women.²⁸ Today, police officers are more willing to respond to cases of violence reported by black citizens.²⁹ The trust that they have garnered may explain the rapidly documented increase in reported rapes.³⁰

B. Causes of Violence Against Women and Young Girls

1. The Causes of Violence Against Women and Young Adolescents Can be Linked to Many Different Factors

Scholars admit that the causes of sexual violence against South Africa's black women and children are many.³¹ Some attribute it to "the [past] reluctance of the police to deal constructively with crime."³² Others argue that poverty and unemployment best explain the epidemic.³³ Black men confront vast economic hurdles, with their rank making up an overwhelming majority of the 50% of unemployed South Africans.³⁴ Babalwa Daza, however, a court counselor who helps women navigate through South Africa's court system, takes issue with this argument:³⁵ "Some people say unemployment. Others will say poverty. I don't agree with that. Since when do you rape because you are hungry?"³⁶ Scholars also note that as women have challenged their traditional roles in society through the pursuit of new educational and employment opportunities, men have come to feel "a corresponding level of resentment."³⁷ Nomfondu Waleza, a clinical psychologist in Cape Town, South Africa who counsels abused

26. Andrews, *supra* note 3, at 433.

27. *Id.*

28. *Id.*

29. Rachel L. Swarns, *Grappling with South Africa's Alarming Increase in the Rapes of Children*, N.Y. TIMES, Jan. 29, 2002, at A6.

30. *Id.* Kristin Fleschner writes that another explanation for the increase in reported rapes may be that with the end of apartheid, black South Africans were finally allowed to become police officers. See e-mail from Kristin Fleschner, 2004–05 Traveling Fellow, Vanderbilt University, to Ashley J. Moore, Executive Student Writing Editor, Vanderbilt Journal of Transnational Law, Vanderbilt University Law School (Sept. 12, 2005, 00:00:31 CDT) (on file with author). "Suddenly there were officers who were not afraid to patrol Soweto and other areas of South Africa that white officers may have not wanted to go." *Id.*

31. Andrews, *supra* note 3, at 433.

32. *Id.*

33. Swarns, *supra* note 29.

34. Nolen, *supra* note 1.

35. Swarns, *supra* note 29.

36. *Id.*

37. *Id.*

women, believes men have turned these tensions inward, with the result being a counterattack against women.³⁸ "There is a backlash in society against women getting somewhere. After two democratic elections there is a sense that women have a better deal than men do," she says. "And men don't like it. The more powerful women become, the more violent men become."³⁹

Numerous experts ascribe the violence to two different factors: the breakdown of traditional family life and a "sense of entitlement."⁴⁰ A migrant labor system existed during apartheid that denied the majority of African people the right to a decent family life.⁴¹ The law forced husbands and wives to live apart eleven months out of the year, with only the one remaining month reserved for the men's annual holiday.⁴² Scores of black children grew up without the protection that comes from a stable family home life.⁴³ As a result, they were susceptible to the violence they witnessed in their communities and homes.⁴⁴ Many abused children grew up to be abusers.⁴⁵ Like the women and girls they subject to abuse, these men are equally damaged and emotionally scarred, in large part because of the legally-mandated schism that existed among families during the apartheid years.⁴⁶

A sense of entitlement also appears to pervade the South African culture. A 1997 article argues that many perpetrators feel entitled to instant gratification⁴⁷ and believe they have a unfettered right to release their "sexual energies."⁴⁸ Some men have been taught that women and girls are nothing more than possessions.⁴⁹ Thus, those committing violent crimes frequently use women's bodies "in a callous

38. Jane Logan, *Rape in South Africa*, HOMEMAKERS, Summer 2000, <http://www.homemakers.com/homemakers/client/en/Life/DetailNews2.asp?idNews=237&pg=3&idSM=203&genhtml=1>.

39. *Id.*

40. *Id.*; Alexandra Arriaga, *HIV/AIDS and Violence Against Women*, [29-SUM] HUM. RTS. 18, 19 (2002); Nolen, *supra* note 1; cf. Julia Frielinghaus, *Rape Debate*, BUS. DAY (S. Afr.), Oct. 26, 2004, available at 2004 WL 95704770 ("A study based on a survey of nearly 300,000 children aged 10–19 in 1,418 schools published in the latest edition of the *British Medical Journal* found that raping 'someone you know' was not seen as sexual violence, and more than a quarter of boys believed girls enjoy rape.").

41. Andrews, *supra* note 3, at 432.

42. *Id.*

43. *Id.*

44. *Id.* at 432–33; Davies, *supra* note 9.

45. Andrews, *supra* note 3, at 432–33; Davies, *supra* note 9.

46. Andrews, *supra* note 3, at 432; Davies, *supra* note 9.

47. Gill Huber, et al., *Demand for Instant Gratification: An Important Factor in Many Rape Cases*, SATURDAY STAR, Jan. 25, 1997, available at <http://www.csvr.org.za/articles/artrape2.htm>.

48. *Id.*

49. Nolen, *supra* note 1.

and careless way.”⁵⁰ The aforementioned article chronicles one story in which a father raped his daughter while his wife was away from home.⁵¹ When questioned about his behavior, the father stated that he felt like sex, and since his wife was not available, he felt entitled to his daughter.⁵² This thinking explains why some have come to refer to South Africa as being a rape-prone society.⁵³ Dr. Rachel Jewkes of the South African Medical Research Council believes “[y]ou don’t get rape in a situation where you don’t have massive gender inequalities. One of the key problems in [South Africa] is that people who commit rape don’t think they are doing anything wrong.”⁵⁴

Most researchers agree that the most significant factor is the lasting impact of the apartheid system.⁵⁵ Some of South Africa’s top politicians have even said as much⁵⁶: “As we all know, the apartheid history of this country left behind a legacy of a serious breakdown of the moral infrastructure of our society,” the deputy president, Jacob Zuma, said before Parliament in November 2001.⁵⁷ “The breakdown of the moral fiber manifests itself in many ways and in all sectors of our society, the rich and poor, urban and rural, black and white, young and old.”⁵⁸ Saths Cooper, a psychologist researching the circumstances surrounding child rape, has stated, “There are demons we [South Africans] still face. We have not come to actual grips with the depth of the depravity that occurred during that apartheid period.”⁵⁹

Since the demise of apartheid, South Africa as a whole has struggled to come to terms with its troubled past.⁶⁰ At the same time, black South Africans face a struggle of their own: attempting to forge an identity after being denied one for so many years.⁶¹ For many, especially black males, this has been a difficult course to navigate, and as they have wrestled with their anger over being denied an identity, women and children have become casualties in the struggle.⁶² Some scholars believe that the violence flows from a sense of powerlessness that the men feel.⁶³ The hope many men felt after

50. Huber, *supra* note 47.

51. *Id.*

52. *Id.*

53. *Id.*

54. Arriaga, *supra* note 40, at 19.

55. Swarns, *supra* note 29.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Davies, *supra* note 9.

61. *Id.*

62. *Id.*

63. Nolen, *supra* note 1.

the end of apartheid has been ripped from them, and now they are left with feelings of vulnerability and insecurity.⁶⁴ Because the traditional notions in society dictate that women are subordinate to men, men may feel entitled to assert their authority over these creatures who, in their eyes, are even lesser beings than they are.⁶⁵ South Africa has seen a "massive social transformation," Cooper commented.⁶⁶ "We don't know to what extent that has caused serious dissonance in individuals."⁶⁷ Everything that has been taken from black men is symbolically embodied in black women and committing acts of violence against them is a means for men to exact vengeance against a society that has so deeply wronged them.⁶⁸

2. Young Girls Have Become the New Target of Sexual Violence

Young girls seem to be particularly inviting to rapists within South African society. They represent innocence and seem to give men an even greater feeling of control due to their weakness and inability to defend themselves against unwanted sexual advances.⁶⁹ According to estimated figures, sixty children are raped everyday in South Africa.⁷⁰ Children under eighteen years of age represent an estimated 40% of South African rape victims.⁷¹ In a country of approximately 46.6 million people,⁷² only 52,000 rapes were reported from April 2002 to April 2003.⁷³ The actual figure is believed to be much higher.⁷⁴ When rape happens to a young girl, culture stands in opposition with the law. Because African culture places great importance on a young girl's virginity, rape victims are marked as "unmarriageable or of less[er] value."⁷⁵ Therefore, public

64. *Id.*

65. *Id.*; see Andrews, *supra* note 3, at 431–32; Vogelman & Lewis, *supra* note 5.

66. Swarns, *supra* note 29.

67. *Id.*

68. Nolen, *supra* note 1.

69. Lloyd Vogelman, *Violent Crime: Rape, in PEOPLE AND THE VIOLENCE IN SOUTH AFRICA* 96–134 (B. McKendrick & W.C. Hoffman eds., 1990), available at www.csvr.org.za/papers/paprapel.htm.

70. Nolen, *supra* note 1.

71. Zavis, *supra* note 6.

72. Statistical Release, Statistics South Africa, Mid-Year Population Estimates, South Africa 2004 (Jul. 27, 2004), available at <http://www.statssa.gov.za>.

73. Compare Nolen, *supra* note 1, with U.S. Census Bureau, U.S. POPClock Projection, <http://www.census.gov/cgi-bin/popclock> (last visited Nov. 19, 2004) (stating that the United States has a population of 294,790,622), and FBI Press Release—Uniform Crime Report 1996 Crime Statistics, Forcible Rape (1996), <http://mbhs.bergtraum.k12.ny.us/cybereng/nyt/crime.htm> (noting that 96,760 forcible rapes were reported in the U.S. in 1996).

74. Nolen, *supra* note 1 (noting that South Africa's police force estimates that only one in eight assaults is brought to their attention); Zavis, *supra* note 6.

75. Bamgbose, *supra* note 7, at 137.

acknowledgement of rape is highly discouraged by family members because of the shame they feel it brings upon the family.⁷⁶ Some African cultures perform purification rituals to “cleanse” the rape victim,⁷⁷ rather than notify the police.

Families, however, can no longer ignore the epidemic because children are not only falling victim to sexual violence but dying from it. The much-publicized AIDS crisis that is ravaging South Africa haunts black citizens like a nightmare from which they cannot seem to wake.

The troubles are easy to enumerate: perhaps one million South Africans already dead from AIDS, from four to five million people infected with H.I.V., a tiny fraction of those receiving antiretroviral medication, and women now about three times more likely than men to become infected. A report issued [in November 2004] by the United Nations said women now account for 60 percent of all infections in sub-Saharan Africa.⁷⁸

A recent study found that more than one in twenty South African children between the ages of two to fourteen is HIV-positive.⁷⁹ Further, most of these infections are not attributable to mother-to-child transmission.⁸⁰ Thus, researchers agree that sexual abuse is one of the most likely factors for this finding.⁸¹

It is a popular myth in AIDS-ravaged South Africa that having sex with a virgin cures the disease.⁸² Some experts believe the myth may play a part in the surge in child rape.⁸³ Mike Earl-Taylor, a researcher in the MTN Centre for Crime Prevention at Rhodes University in Grahamstown, says, “[the idea of a “virgin cure”] can’t be discounted as a factor here Some of these men are motivated by the [fact] that there is no cure and the government here is doing nothing.”⁸⁴ The myth is not a new idea.⁸⁵ Four hundred years ago, European men tried to cure syphilis by having sex with virgins.⁸⁶ Recently, the myth has not only been reported as a factor in child rapes in South Africa, but also in Thailand, Cambodia, and across southern Africa.⁸⁷ Luke Lamprecht, director of the Teddy Bear Clinic

76. *Id.*

77. *Id.*

78. Roger Cohen, *The World; AIDS Unawareness, In South Africa, Denial Is a Form of Protection*, N.Y. TIMES, Nov. 28, 2004, available at 2004 WLNR 12279291.

79. OLIVE SHISANA & LEICKNESS CHISAMU SIMBAYI, NELSON MANDELA/HSRC STUDY OF HIV/AIDS 47 (2002), available at http://www.hsrbpress.ac.za/user_uploads/tblPDF/2009_00_Nelson_Mandela_HIV_Full_Report.pdf.

80. *Id.*

81. *Id.*

82. Swarns, *supra* note 29.

83. *Id.*

84. Nolen, *supra* note 1.

85. *Id.*

86. *Id.*

87. *Id.*

for Abused Children in Johannesburg, South Africa, however, believes the myth should be debunked as a cause of South Africa's growing number of child rapes.⁸⁸ He says that of the 250 assaulted children he encountered in 2002, there was only one case where the "virgin cure" was known to be the cause.⁸⁹

3. The South African Government Chooses to Point the Finger at Racism Rather Than Deal with the Explosive Rape Crisis

In his 2002 New Year's statement to the nation, South African President Thabo Mbeki acknowledged the mounting public outcry over child rape cases.⁹⁰ Mbeki proposed that government officials and South African citizens join together to fight the "horrible crime."⁹¹ Just three years later, President Mbeki has vowed to fight a different battle—one against those who stereotype blacks as "lazy, liars, foul-smelling, diseased, corrupt, violent, amoral, sexually depraved, animalistic, savage and rapist."⁹² In the October 1, 2004 edition of his personal essay, posted every Friday on the website of the governing African National Congress, President Mbeki attacked those both within his country and internationally who believe rape is endemic in South African society.⁹³ Mbeki believes that racism is fueling the allegedly inaccurate information being propagated around the globe.⁹⁴ President Mbeki wrote in his essay,

The psychological residue of apartheid has produced a psychosis among some of us such that, to this day, [whites] do not believe that our non-racial democracy will survive and succeed

For them our new democracy feels fraught with threats. They must continuously find negative superlatives to convey that story that South Africa is the world capital of all the negative things that affect all humanity.

In this situation, fear of crime becomes the concentrated expression of fear about their survival in a sea of black savages, which they fuel by entertaining the mythology that whites are the primary targets merely because of their race.⁹⁵

President Mbeki's comments were in response to an article written by a former friend and ally, Charlene Smith, who criticized

88. *Id.*

89. *Id.*

90. Swarns, *supra* note 29.

91. *Id.*

92. Cohen, *supra* note 78.

93. Thabo Mbeki, *Letter from the President: When is Good News Bad News?*, 4 ANC TODAY 39, Oct. 1–7, 2004, available at <http://www.anc.org.za/ancdocs/ancoday/2004/at39.htm>.

94. *Id.*

95. *Id.*

the South African government for its failure to fight sexual violence and the horrifying reality of HIV infection that many rape victims must face.⁹⁶ According to Smith, the slight drop in reported rapes cited in the government's 2003–04 crime report belies the government's inaction.⁹⁷ The headline of Smith's article aptly expresses her position: "Rape has become a sickening way of life in our land."⁹⁸ As President Mbeki's response to the article indicates, he believes that white South Africans' racist views toward blacks has helped perpetuate this image of blacks as savage beasts, unable to control their sexual urges.⁹⁹ President Mbeki believes the real crisis confronting South Africans is not rape, but enduring racism from the days of apartheid.¹⁰⁰

Since his essay's publication, commentators have sparred over whether President Mbeki's focus on racist motives is really just a tactical maneuver that Mbeki has employed to silence those who have been critical of how he has handled the issues of sexual violence and AIDS.¹⁰¹ The essay touched off a shouting match on the floor of the South African Parliament in which white legislators accused President Mbeki of just that.¹⁰² President Mbeki fired back, charging the legislators with "pretending that racism died with apartheid."¹⁰³ Rhoda Kadalie, a human rights activist in Cape Town, South Africa, believes the President is "obsessed with his own notions of race" and far too sensitive about the subject of black male sexuality.¹⁰⁴ The result, she says, has been the President's failure to fight sexual violence and AIDS in the midst of the country being depopulated of its young women.¹⁰⁵ Shadrack Gutto, a Johannesburg professor who heads the Center for African Renaissance Studies, agrees with the President that racism should be rooted out. It is a matter of "continuous engagement with oneself," he says.¹⁰⁶ Mr. Gutto, however, does not believe that Charlene Smith's article promoted racist views: "I don't think she was saying that black people are prone to rape."¹⁰⁷

96. Sharon LaFraniere, *Letter from Africa; After Apartheid: Heated Words About Rape and Race*, N.Y. TIMES, Nov. 24, 2004, available at 2004 WLNR 12160610.

97. Charlene Smith, *Rape Has Become a Sickening Way of Life in Our Land*, SUNDAY INDEP., Sept. 26, 2004, available at <http://www.sundayindependent.co.za/index.php?fSectionId=1042&fArticleId=2238856>.

98. *Id.*

99. LaFraniere, *supra* note 96.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

As previously mentioned, Charlene Smith had been both a friend and ally to President Mbeki during the years of protest against apartheid.¹⁰⁸ Smith has a history of arrests for her anti-apartheid stance and became a champion for rape victims after she herself was raped in 1999.¹⁰⁹ In an interview, Smith said she wrote her article to provoke a discussion about rape, not race.¹¹⁰ "What Mbeki has done is make it a race issue," she says. "He really must not do this because it will fracture our society again."¹¹¹ In a later essay to party members, President Mbeki stated that he would continue to advocate for discussing racism in the open.¹¹² His supporters, like the City Press, a South African newspaper which bills itself as the nation's largest English-language newspaper targeting a mass black audience, believe that racism has been covered up for far too long.¹¹³ An editorial published after President Mbeki's October 1 essay challenged whites to "follow the president's lead and 'speak up about the kind of dinner table conversations that go on when black people aren't around.'"¹¹⁴ These comments vividly illuminate the splintered society's continuing difficulties with race relations,¹¹⁵ and may help explain why the Sexual Offences Bill, which has undergone numerous revisions since its inception,¹¹⁶ has been floundering before the South African Parliament for almost a decade.¹¹⁷

III. SEXUAL OFFENCES BILL

Those concerned with combating the violence inflicted upon women and young girls have long looked to the South African government for a solution. Women's advocates observe that "it has now become accepted in South African law that the 1996 Constitution, read with international human rights law, imposes certain duties on the South African state to address violence against women, including sexual assault."¹¹⁸ Section 12 of the Constitution's

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Fleschner, *supra* note 12.

117. *Id.*

118. Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the Draft Criminal Law (Sexual Offences) Amendment Bill, 2003, from Amnesty International and Human Rights Watch (Sept. 15, 2003), <http://web.amnesty.org/library/print/ENGAFR530062003> [hereinafter Submission].

Bill of Rights states, "Everyone has the right to bodily and psychological integrity, which includes the right . . . to security in and control over their body."¹¹⁹ Further, the Bill of Rights provides that "[e]veryone has the right to freedom and security of the person which includes the right . . . to be free from all forms of violence from either public or private sources."¹²⁰

Though the government has been criticized for not actively¹²¹ accepting these duties, it does have a Sexual Offences Act on its books.¹²² The current law, however, under review since the late 1990s, "does not recognise or deal appropriately with the reality of sexual violence experienced in the society."¹²³ The government finally seemed to be moving towards a permanent change to the law when the Criminal Law (Sexual Offences) Amendment Bill was introduced before Parliament.¹²⁴ The bill seeks, among other things, to broaden the definition of rape and other forms of sexual misconduct.¹²⁵ The question remains whether the bill will adequately protect women and young girls from the horrors of rape and sexual assault. Part V of this Note will examine this question more fully.

A. *The History Behind the Amended Sexual Offences Bill*

In 1996, South Africa's Minister for Justice and Constitutional Development requested that the South African Law Commission investigate sexual offences by and against children to make recommendations for how to reform this particular branch of the law.¹²⁶ The Commission proceeded by appointing a project committee, which formulated an issue paper on sexual offences against children.¹²⁷ The Commission published the paper for general information and comment the following May 1997.¹²⁸

Based on the response to the paper, the Commission began to recognize that any proposed changes to the sexual offences law would have a far-reaching effect not only on the position of children, but on

119. S. AFR. CONST. 1996 ch. 2, § 12(2).

120. *Id.* § 12(1)(c).

121. Zavis, *supra* note 6 (criticizing the government for failing to properly implement a program for providing AIDS-prevention medication to rape victims).

122. *SA Plans Awareness Week on Sexual Offences Bill*, PANAFRICAN NEWS AGENCY (PANA) DAILY NEWSWIRE, Aug. 5, 2004, available at Westlaw, 8/5/04 PANAFNEWS 00:00:00.

123. *Id.*

124. *Id.*

125. *Id.*

126. SOUTH AFRICAN LAW COMMISSION REPORTS, PROJECT 107 SEXUAL OFFENCES REPORT ch. 1, at 1 (2002), available at <http://wwwserver.law.wits.ac.za/salc/report/report.html> [hereinafter PROJECT 107].

127. *Id.*

128. *Id.*

adults as well.¹²⁹ The South African government had apparently come to believe the same, because the Commission subsequently received a request from the Justice Parliamentary Portfolio Committee and the then-Deputy Minister of Justice¹³⁰ to consider how sexual violence might also affect adults.¹³¹ Along with this request, the Commission received the additional task of recommending reforms to South Africa's criminal justice processes that address sexual offences.¹³² Thus, the Commission's investigation expanded to include sexual offences against adults and renamed sexual offences,¹³³ resulting in the Commission appointing additional members with expertise in the field of adult sexual abuse to its existing project committee.¹³⁴

With the inclusion of adults, the Commission grappled with how to address the possibility that the focus on children might be lost.¹³⁵ It considered publishing separate discussion papers for adults and children, but in the end, "practical considerations and political and other pressures" led them to produce four discussion papers, two dealing with both adults and children, a third focused only on adults, and the fourth concentrating exclusively on child pornography.¹³⁶ By 2002, the Commission had released only the first two of the four discussion papers.¹³⁷ The first addresses the substantive law relating to sexual offences, while the second explores the process and procedural law relating to sexual offences.¹³⁸ Both were accompanied by draft legislation, which eventually became part of the draft Sexual Offences Bill that the Commission submitted to the Department of Justice and Constitutional Development.¹³⁹

In its multi-chapter report accompanying the draft bill, the Commission outlined innovative and progressive recommendations that would change the current structure of South Africa's criminal justice system as it relates to rape and sexual assault victims.¹⁴⁰ The Commission had a number of goals in issuing its report: (1) to encourage victims of sexual violence to approach the criminal justice

129. *Id.*

130. Dr. Manto Tshabalala-Msimang, now Minister of Health.

131. PROJECT 107, *supra* note 126, ch. 1, at 1.

132. *Id.*

133. *Id.*

134. *Id.* at 2.

135. *Id.* at 1–2.

136. *Id.*

137. *Id.* The papers are entitled as follows: *Discussion Paper 85: Sexual Offences: The Substantive Law*, and *Discussion Paper 102: Sexual Offences: Process and Procedure*. *Id.*

138. *Id.*

139. *Id.* at 2–3

140. *Id.* at 3.

system for assistance; (2) to improve the experiences of those victims who choose to utilize the system; and (3) to advocate for the rights of alleged perpetrators of sexual offences.¹⁴¹ The Commission's report also acknowledges the unique interplay between South African culture and its promulgated laws. It includes non-legislative recommendations that deal with some of the difficulties encountered by victims of sexual violence and a number of social factors contributing to the high incidence of sexual violence.¹⁴² Further, the report states, "Although [these recommendations fall] outside the narrow scope of law reform . . . [i]t is hoped that in [presenting them], action by the appropriate government structures will be encouraged and that communities will be galvanised to participate in the fight against this form of violence."¹⁴³

B. Rape: The Current Law

South Africa's current legal state of affairs only recognizes certain sexual acts as unlawful.¹⁴⁴ Rape, a common law offense under South African law, is defined as a man having "unlawful, intentional sexual intercourse" with a female "without her consent,"¹⁴⁵ with emphasis being placed on the absence of *valid* consent.¹⁴⁶ The term "sexual intercourse" presupposes a male's penetration of the female sexual organ with his own sex organ.¹⁴⁷ Thus, other forms of intercourse, including per anum, oral penetration, and the insertion of foreign objects into the orifices of the body,¹⁴⁸ are effectively excluded from the current definition of rape.¹⁴⁹ One need only look, however, to the alterations made by American state legislatures to their statutes' definitions of rape for evidence that the offence encompasses more than just the unwanted penetration of one person's sexual organ with another's.¹⁵⁰ One paper argues that South Africa's extremely narrow definition of rape has

141. *Id.* at 3–4.

142. *Id.* at 4.

143. *Id.*

144. Sandra Bollen, et al., *Violence Against Women in Metropolitan South Africa: A Study on Impact and Service Delivery*, MONOGRAPH No. 41, Sept. 1999, available at <http://www.iss.co.za/Pubs/Monographs/No41/Introduction.html>.

145. 2 J.R.L. MILTON, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE* 439 (3d ed. 1996).

146. PROJECT 107, *supra* note 126, ch. 3, at 30.

147. *Id.*

148. This act would constitute indecent assault, a common law offence. *Id.* at 38 n.9.

149. 2 MILTON, *supra* note 145, at 439, 447–51.

150. See David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 321 (2000) (discussing changes that have legislatures have made to their definitions of rape).

had an adverse affect upon survey findings and other gender violence research: a woman who believes that rape only constitutes vaginal penetration will not report when she has been a victim of any other type of sexual assault¹⁵¹ because her experience simply does not fit within the government's legal definition. South Africa defines rape in gender specific terms; hence, the common law only recognizes an act as being rape when a male sexually violates a female.¹⁵² Similarly, an irrebuttable presumption exists that an adolescent girl under the age of twelve years old is incapable of consenting to sexual intercourse, but no similar presumption exists for adolescent boys of the same age.¹⁵³

In addition to the common law provisions, South Africa has on its books Act No. 23 of 1957 (Sexual Offences Act),¹⁵⁴ which serves as the current governing sexual assault law in South Africa. Many believe that the law is outdated,¹⁵⁵ and welcome the reforms that would be ushered in by the Sexual Offences Bill.¹⁵⁶ Section 14 of the Sexual Offences Act, which deals with sexual offences involving youths, would be entirely repealed with the passage of the Sexual Offences Bill.¹⁵⁷ Section 14 reads:

Any male person who –

- a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or
- b) commits or attempts to commit with such a girl or a boy under the age of 19 an immoral or indecent act; or
- c) solicits or entices such a girl or boy to the commission of an immoral or indecent act, shall be guilty of an offence.¹⁵⁸

As with the common law, only males can be charged with a sexual offence. Section 14 also fails to protect adolescent girls either over or under the age of sixteen who do not experience "unlawful carnal intercourse." Section 14 goes on to establish a list of defenses that

151. Bollen, *supra* note 144.

152. 2 MILTON, *supra* note 145, at 439.

153. *Id.*; see also Interpol—Legislation of Interpol Member States on Sexual Offenses Against Children, <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSouthAfrica.asp> (stating that South African common law defines statutory rape as intercourse with a girl under 12 years of age).

154. Sexual Offences Act 23 of 1957. This Act should not be confused with the Sexual Offences Bill, which is currently under consideration by the South African Parliament and would supplant the current Sexual Offences Act as the controlling legal doctrine in regards to sexual assaults. See *infra* note 162.

155. Age of Sexual Consent—South Africa, <http://www.sexlog.no/lavalder/southafrica.htm> ("[T]his Act is completely outdated (a new Sexual Offences Act will hopefully soon be promulgated) . . .").

156. See Submission, *supra* note 118.

157. Sexual Offences Act 23 of 1957 s. 14.

158. *Id.*

serves to further limit those victims who might otherwise benefit from the Sexual Offences Act.¹⁵⁹ In essence, neither South Africa's Sexual Offences Act nor its common law serve as an adequate deterrent to would-be rapists, the majority of which, statistics indicate, will never be convicted.¹⁶⁰

The next Section of this Note outlines the proposed Sexual Offences Bill, which supporters hope will significantly change the legal climate in South Africa for rape and sexual assault victims.¹⁶¹

C. Rape: The Proposed Law

Since its introduction in the late 1990s, the Sexual Offences Bill has undergone a number of amendments.¹⁶² Despite the many revisions however, the Sexual Offences Bill in its present form would still successfully alter a great deal of South Africa's legal landscape. Reading through the Sexual Offences Bill, one is immediately struck by both the definitions in § 1 of the bill and the codification of rape as a statutory crime, as opposed to its present common law distinction.¹⁶³ Equally striking is the greatly broadened definition of what qualifies as rape. Section 2 of the Sexual Offences Bill states:

A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.¹⁶⁴

159. *Id.* Those defenses include the following:

the girl at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of 21 years and that it is the first occasion on which he is so charged; or that the girl or person in whose charge she was, deceived the person so charged into believing that was over the age of 16 years at the said time.

Id.

160. Martin Schönteich, *Does Capital Punishment Deter?*, 11(2) AFR. SEC. REV. 89, 90 (2002), available at <http://www.iss.org.za/PUBS/ASR/11No2/Schonteich.html> (stating that only 7.6% of all recorded rapes in 2000 resulted in the conviction of the perpetrators).

161. Submission, *supra* note 118 ("The draft law . . . [seeks] to improve access to justice and the efficiency of the criminal justice system in its response to rape and other sexual offences.").

162. Compare Sexual Offences Act 23 of 1957 with Criminal Law (Sexual Offences) Amendment Bill, B 50-2003, §§ 1-2, available at <http://www.polity.org.za/pol/bill/2003> (explanatory summary of the Bill published in GG25282 of July 30, 2003).

163. Criminal Law (Sexual Offences) Amendment Bill §§ 1-2.

164. *Id.* § 2.

In addition, the act of penetration is considered “*prima facie* unlawful if it is committed . . . in any coercive circumstance.”¹⁶⁵ One scholar believes that South African society must acknowledge that rape victims are coerced in some instances into having sexual intercourse to overcome patriarchal attitudes that previously have denied justice to victims of sexual coercion.¹⁶⁶ This bold, forward thinking proviso is counter to those who characterize South Africa as a highly patriarchal society. The bill also speaks to those who intentionally fail to disclose to their victim whether they are infected with a sexually transmitted disease.¹⁶⁷ This provision is particularly apt with AIDS being the epidemic that it is, and transmission rates on the rise in South Africa, largely due to the corresponding rape epidemic.

The bill’s definition of rape still fails to encompass either oral penetration or the insertion of foreign objects into another’s body. The bill does state, however, that both of these acts constitute a “sexual violation.”¹⁶⁸ Statutory rape has also been codified in § 9 of the bill, with the age limit now being set between twelve and sixteen years of age.¹⁶⁹ Section 9 only applies to children between the ages of twelve and sixteen who may have consented to having sex, or to engaging in an “indecent act,”¹⁷⁰ but by virtue of being below the age of sixteen, do not meet the legally mandated age of consent.¹⁷¹ Children below the age of twelve are considered to be “incapable in law of appreciating the nature of an act which causes penetration,”¹⁷² a presumption adopted from the common law. Thus, sexual intercourse with a child younger than twelve years old constitutes rape. Notably, the entire Sexual Offences Bill speaks in strictly gender neutral terms. Though this Note addresses the importance of this bill in curbing sexual assaults against women and adolescent girls, the Author would be remiss not to acknowledge that rape can,

165. *Id.* § 2(2)(a).

166. *See* Bryden *supra* note 150, at 317.

167. Criminal Law (Sexual Offences) Amendment Bill § 2(4)(c).

168. *Id.* §§ 3–4.

169. *Id.* § 9.

170. *Id.* Section 1 of the Sexual Offences Bill defines “indecent act” as any act which causes,

a) direct or indirect contact between the anus or genital organs of one person or, in the case of a female, her breasts and any part of the body of another person or any object, including any part of the body of an animal; b) exposure or display of the genital organs of one person to another person; or c) exposure or display of any pornographic material to any person against his or her will or to a child, but does not include an act which causes penetration.

Id. § 1.

171. *See id.* § 9.

172. *Id.* § 2(5)(f).

and does, happen to both men and young boys, and laws should be written, as the Sexual Offences Bill has, in such a way as to protect those groups of individuals.

Section 15 stands as another noteworthy piece of the Sexual Offences Bill. It governs "vulnerable witnesses," who the bill describes as either being complainants in the proceeding pending before the court, or children.¹⁷³ The section states that if a witness in a court criminal proceeding involving the alleged commission of a sexual offence meets one of the two criteria listed above for being a vulnerable witness, then the court must declare that individual as such.¹⁷⁴ After a witness is declared to be vulnerable, the bill obligates the court to protect her via one of the four prescribed measures,¹⁷⁵ or through "any other measure which the court deems just and appropriate."¹⁷⁶ One striking measure allows vulnerable witnesses "to give evidence by means of closed circuit television as provided for in section 158 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), irrespective of any additional qualifying criteria prescribed by that section."¹⁷⁷ As the next Section of this Note will explain, this provision is partly due to the innovative steps that South Africa has taken to make its court system more accessible to juvenile victims of rape and sexual assault.

D. *The Move to Repair How South Africa's Criminal Justice System Deals with Victims of Rape*

In addition to the revision of its sexual offences law, South Africa established a regional legal model when it opened the doors of its first sexual offences court in 1992.¹⁷⁸ Since that time, twenty-nine other courts, dedicated solely to sexual assault crimes, have been created.¹⁷⁹ This homegrown solution has been highly effective in providing justice for the many victims of rape.¹⁸⁰ As previously noted, rape is extremely prevalent in South Africa, but conviction

173. *Id.* § 15(1)(a)–(b).

174. *Id.*

175. *Id.* § 15(4).

176. *Id.* § 15(4)(e).

177. *Id.* § 15(4)(a).

178. Bamgbose, *supra* note 7, 137–38.

179. Nicole Itano, *South Africa Finds 'Rape Courts' Work*, CHRISTIAN SCIENCE MONITOR, Jan. 29, 2003, available at 2003 WLNR 226976.

180. *Id.* Kristin Fleschner argues that, "[r]ape courts look a lot better on paper than in real life. The cases that are chosen for these courts are usually easier cases. Advocates and researchers who have been in the courts wonder if they [the courts] are truly successful." E-mail from Kristin Fleschner, 2004–05 Traveling Fellow, Vanderbilt University, to Ashley J. Moore, Executive Student Writing Editor, Vanderbilt Journal of Transnational Law, Vanderbilt University Law School (Sept. 12, 2005, 00:00:31 CDT) (on file with author).

rates are not.¹⁸¹ In the sexual offences courts, however, the conviction rates are much higher because sexual assault is the sole priority of the court system.¹⁸²

Through the enactment of these courts, the "rape capital" of the world has established an archetype that other countries can follow to aid in their efforts to combat sexual assault within their own borders.¹⁸³ About 70% of the victims for whom the court was established are children.¹⁸⁴ For this reason, the courts are geared towards comforting these young victims. Each court boasts a Teddy Bear Clinic where children can play with stuffed animals and toys while learning how to testify in court.¹⁸⁵ Further, when the time comes for the children to actually testify, the clinic serves as a protective and safe area from which children can give their testimony while the court watches them on closed-circuit television.¹⁸⁶

Arguably, South Africa's Constitution greatly protects the accused.¹⁸⁷ "[C]autious rules are applied during the prosecution of rape cases, which require the court to take additional care in accepting the uncorroborated evidence of the victim."¹⁸⁸ Despite the provisions in South Africa's Bill of Rights that extol the concept of "bodily integrity,"¹⁸⁹ the victim's prior sexual history may be admitted, as well as evidence of prior sexual acts.¹⁹⁰ Until the creation of the sexual offenses courts, the accused received a great amount of protection, while no consideration seemed to be given to the victim.¹⁹¹ Now the government is making great strides to take the victim's rights into account.¹⁹² Many thought the government had further shifted its focus towards protecting the victim when it pledged in April 2002 to provide post-exposure prophylaxis (PEP) to rape victims.¹⁹³ These drugs are "given immediately following exposure to an infectious organism . . . in an attempt to prevent the

181. Itano, *supra* note 179.

182. *Id.* (discussing how sexual assault courts are achieving convictions in 75 to 90% of the cases they bring to trial, while the conviction rate for sexual offenses brought in regular courts is only 50%).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Bamgbose, *supra* note 7, at 137.

189. S. AFR. CONST. 1996 ch. 2, §12(2).

190. Bamgbose, *supra* note 7, at 137.

191. Itano, *supra* note 179.

192. *Id.*

193. See Zavis, *supra* note 6.

infection from gaining hold in the body.”¹⁹⁴ “South Africa became one of the first African nations to [make such] a pledge,” which only came after intense pressure from civil society groups.¹⁹⁵ Even after approving the use of the antiretroviral drugs, South African President Thabo Mbeki suggested the drugs “may be too toxic to use.”¹⁹⁶ Further, his government argued that the drugs were simply too expensive to treat AIDS.¹⁹⁷

More than a year later, the South African government seemed to finally make good on its pledge when it announced a nationwide treatment program for South Africans living with AIDS.¹⁹⁸ It went on to approve the plan in November 2003, giving hope to millions of South Africans that free antiretroviral drugs would be in their hands within five years.¹⁹⁹ Despite its efforts, the government has continued to face criticism from South Africans and the international community. Specifically, the U.S. based Human Rights Watch has accused the South African government of “inaction, mixed messages and inadequate information,” all of which, the group argues, are undermining the country’s pledge.²⁰⁰

IV. COMPARING U.S. LAW WITH SOUTH AFRICA’S PROPOSED BILL

A. Rape in America

Though the rape crisis has reached epidemic proportions in South Africa, during the 1990s the United States led the world with its number and rate of reported rapes.²⁰¹ According to estimates, every six minutes a woman is raped in the United States.²⁰² Further, over the past ten years, rape has risen four times as fast as the total national crime rate.²⁰³ The U.S. Department of Justice reports that, “in total, women aged twelve and older annually sustain almost five million violent victimizations; approximately five hundred thousand

194. Liz Highleyman, *Glossary*, BULLETIN OF EXPERIMENTAL TREATMENTS FOR AIDS (BETA), Mar. 1997, available at <http://www.sfaf.org/treatment/beta/b32/b32glos.html>.

195. Zavis *supra* note 6; see *South African Govt. Undermining Own AIDS Programme*, AFROL NEWS, Mar. 4, 2004, available at <http://www.afrol.com/articles/11446> [hereinafter *Undermining AIDS Programme*].

196. Zavis, *supra* note 6.

197. *Id.*

198. *Undermining AIDS Programme*, *supra* note 195.

199. Zavis, *supra* note 6.

200. *Id.*

201. Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future*, 34 TULSA L.J. 367, 369 (1999).

202. *Id.* at 369–70.

203. *Id.* at 370.

of these . . . are rapes and sexual assaults."²⁰⁴ Congress was very much aware of these grim statistics when it passed the now decade old Violence Against Women Act (VAWA),²⁰⁵ sweeping legislation that many hoped would drive these statistical figures down.

B. *Violence Against Women Act*

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act (Violent Crime Control Act), a grandiose crime bill that rested primarily upon three distinct pillars: policing, prevention, and punishment.²⁰⁶ Critics argue that despite the act being "heralded as a bipartisan effort to 'get tough on crime,'" it was awash in election-year politics, and therefore, has not been an effective deterrent of crime.²⁰⁷ The prevention piece of the act rested, in part, upon the VAWA, which President Bill Clinton signed into law on September 13, 1994, as Title IV of the Violent Crime Control Act.²⁰⁸ The VAWA has elicited some controversy, specifically in regards to its most contentious provision, the civil rights remedy, codified at 42 U.S.C. § 13981.²⁰⁹ This provision, which has been adjudged unconstitutional by the Supreme Court,²¹⁰ provides:

A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence to] . . . be [held] liable to the party injured, in [a federal] action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and other such relief as a court may deem appropriate.²¹¹

Because the legal structures in America and South Africa differ, the arguments related to this remedy will not be explored in this Note. Part V, however, outlines a number of specific provisions from the

204. *Id.* (citing Johanna R. Sharge, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1849 (1997)).

205. *See id.* at 383 ("[Congressional] hearings provided a forum for victims, policy makers, social service workers, politicians, and law enforcement to detail the acute need for the Violence Against Women Act . . .").

206. Symposium, *Violent Crime Control and Law Enforcement Act of 1994: Introduction*, 20 U. DAYTON L. REV. 557, 557 (1995).

207. *Id.*; Rick Montgomery, *Clock Ticking on Assault Gun Ban: Politics, Flaws Put Extension in Doubt*, THE KANSAS CITY STAR, May 2, 2004, at A14, available at 2004 WL 876647 ("The public believes there is an assault weapons ban when there isn't You can't argue with a straight face that the ban has been effective." (citation omitted)).

208. Cain, *supra* note 201, at 383, 385.

209. *See id.* at 368 ("From its inception, section 13981 . . . faced deep resistance and suspicion.").

210. *See United States v. Morrison*, 529 U.S. 598, 598 (2000).

211. 42 U.S.C. § 13981(c) (2000).

Violent Crime Control Act that the Author believes South Africa should incorporate into its proposed Sexual Offences Bill.

The first chapter of the VAWA addresses federal penalties for sex crimes. The VAWA recognizes that some sexual offenders choose to commit further offences after they have already been convicted of at least one other sexual offense. Thus, the VAWA amends the sentencing guidelines, authorizing a term of imprisonment up to twice that otherwise authorized for a repeated sexual offender.²¹² In this same chapter, Congress has authorized that a guilty defendant shall pay a victim the full amount of losses as determined by the court.²¹³ The statute in which this section is codified defines the term "victim's losses" in a number of ways: as medical services, therapy (either physical or rehabilitative), necessary transportation, temporary housing, lost income, and attorneys' fees.²¹⁴ This federal provision ensures that victims of a violent sexual assault will be justly compensated. Moreover, the VAWA provides federal grant money for "community efforts to fight violence against women (e.g., [through the erection] of domestic violence shelters, state databases to track reporting of rape and domestic violence, a national study on campus sexual assault, and reports on battered women's syndrome)."²¹⁵ All states are eligible to receive such grants, but only if they incur all the expenses associated with forensic medical (rape) exams used by medical professionals when a woman arrives at a hospital alleging that she has been raped.²¹⁶ This measure encourages women to seek out assistance following a rape, despite their financial situation.

A number of important evidentiary rules were introduced in the VAWA. One of the most significant for rape victims is Rule 412 of the Federal Rules of Evidence (Rule 412). This rule, which models itself after the "rape shield" statutes found in a majority of states,²¹⁷ prohibits evidence concerning alleged sexual misconduct from being admitted in any civil or criminal proceeding when offered to prove the alleged victim engaged in past sexual behavior or to prove her sexual predisposition.²¹⁸ The following exceptions to inadmissibility, however, do apply: (1) when evidence is offered to prove that a person other than the accused was the source of seminal fluid, injury, or other physical evidence; (2) when evidence of specific instances of

212. 18 U.S.C. § 2247(a) (2000).

213. *Id.* § 2248(b)(1).

214. *Id.* § 2248(b)(3).

215. Cain, *supra* note 201, at 368; 42 U.S.C § 3796gg-4.

216. 42 U.S.C. § 3796gg-4.

217. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 492-93 (4th ed. 2000).

218. FED. R. EVID. 412.

prior sexual behavior between the accused and the alleged victim is offered to prove the latter's consent; and (3) when not allowing the evidence would violate the defendant's constitutional rights.²¹⁹

The above provisions have been spotlighted because they are measures that the Author believes could be adopted by the South African Government and incorporated into the Sexual Offences Bill. Armed with these suggestions and a number of others specific to the rape crisis in South Africa, the Author proposes a number of amendments in Part V that would transform the Sexual Offences Bill into one that could more effectively combat South Africa's rape phenomenon.

V. SOLUTION: LEGISLATION MAKING THE SEXUAL OFFENCES BILL MORE VICTIM-FRIENDLY

A. *Expanding the Definition of Rape and its Defenses*

Arguably, in its present form, the Sexual Offences Bill does not contain important reforms consistent with developments in international human rights, humanitarian, and criminal law.²²⁰ Though this Author applauds the reforms encompassed within the bill, there are a number of concerns that the bill fails to address. This Section will attempt to illuminate recommendations that will strengthen the force of the bill.

Though the Sexual Offences Bill expands the definition of rape to include anal as well as genital penetration, in contrast to the current common law definition, the Sexual Offences Bill still fails to include either oral penetration or the insertion of foreign objects into another's body. Instead, the separate offences of "oral genital sexual violation" and "sexual violation," respectively, have been created to cover these sexual acts. By creating two separate offences to cover these crimes, criminal justice officials and the public at large may view crimes that are less serious than rape when, in actuality, both offences constitute rape. Thus, because oral genital sexual violations and sexual violations via a foreign object can be just as damaging and traumatic²²¹ as genital or anal rape, the present definition of rape found in the bill should be amended to include these acts.

In addition to the above definition of rape, the bill also states that it shall be considered an act of rape for a person to "intentionally fail[] to disclose to [his or her sexual partner] . . . that he or she is

219. *Id.*

220. Submission, *supra* note 118.

221. *Id.*

infected by a life-threatening sexually transmissible infection in circumstances in which there is significant risk of transmission of such infection to that [partner]."²²² The partner need not actually be infected, but simply be at risk for infection. Because the entire Sexual Offences Bill is written in gender-neutral terms, this particular provision increases a woman's vulnerability to a charge that she intentionally exposed her sexual partner to a life-threatening illness. Assuming that the term "life-threatening sexually transmissible infection" specifically refers to HIV or AIDS, a woman who fails to reveal to her partner that she is infected with the disease would be subject to a charge under this provision. In so far as testing goes,

[w]omen are more likely than men to know their HIV status due to testing . . . conducted through antenatal clinics. [However,] [m]any HIV-positive women, who were themselves infected by their husbands or partners . . . risk violence or other serious consequences if they reveal their status, or if they insist on condom use or refuse sex.²²³

As a result, some argue that this provision will serve to only further victimize women, who are already disproportionately falling victim to this disease.²²⁴ The measure rests on a solid public policy rationale—just as men should not be permitted to simply infect an unknowing woman with HIV, women should not be exempt from this mandate either. To soften the provision though, the bill could introduce a defense to this "intentional infection" clause that a man or woman could raise. The defense would allow a person to argue that fear of violence or bodily harm prevented her from fully disclosing her HIV status. The defense would require some type of evidence upon which it could be based, such as evidence of the alleged victim acting violently in the past towards a sexual partner, or the alleged "attacker" having been the victim of previous reprisal when she revealed her HIV status to other sexual partners. This evidentiary showing would limit the floodgates effect; thus, every person accused of attempting to intentionally infect his or her partner would not be able to raise this defense without having real proof to substantiate it.

The creation of this defense would prevent the egregious situation of a woman being incarcerated solely due to her fear that revealing her HIV status would somehow lead to injury or even death. Another option, other than creating a defense to this crime, would be to criminalize intentional HIV infections under the common

222. *Id.*

223. *Id.*

224. *Id.*; see Cohen, *supra* note 78 ("A report issued last week by the United Nations said women now account for 60 percent of all infections in sub-Saharan Africa.").

law crime of assault, or even attempted murder.²²⁵ Thus, the intentional infection provision could be removed altogether from the bill. This Author would argue, though, that the measure should remain, with certain ambits created as a means of checks and balances. The provision makes an important statement to those who may purposely infect another, under the auspices of seeking to be cured of the disease or simply to punish another individual for that infected person's misfortune, and may help decrease the high HIV infection rate among women and young adolescent girls.

B. *Evidentiary Rules and Permissible Defenses*

Section 2(6) of the Sexual Offences Bill states that a previous or existing relationship, marital or otherwise, does not constitute a defense to rape. This exclusion prevents husbands from escaping rape charges for sexually assaulting their spouses and invalidates the once commonly held belief in both the United States and South Africa that men could not rape their wives.²²⁶ The bill could guarantee that the victim would not be placed on trial through the incorporation of a rule similar to Rule 412. Such a provision would prevent a woman's past sexual activities from being placed on display before the court; such occurrences deter some women from coming forward and testifying for fear that they will be labeled as promiscuous or immoral. Though African culture differs in some respects from U.S. culture, it is becoming widely accepted around the world that most women engage in some form of pre-marital sex, many times with multiple sexual partners. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, has written:

The essential insight behind the rape shield statute is that in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she *consented* to engage in this activity with [a] defendant on the occasion on which she claims that she was raped.²²⁷

Several of the exceptions to Rule 412 are also valid measures that should be included within the Sexual Offences Bill as a means of enabling the alleged attacker to mount a defense in response to the charges levied against him. This Author, however, disagrees with an exception found in Rule 412 that allows a defendant to offer evidence of prior sexual behavior between the accused and the alleged victim

225. Submission, *supra* note 118.

226. Cain, *supra* note 201, at 372.

227. Sandoval v. Acevedo, 996 F.2d 145, 149 (7th Cir. 1993).

as proof of the latter's consent. This provision gives much more deference to the defendant than the one proposed in § 2(6) of the Sexual Offences Bill.²²⁸ The exception in Rule 412 asserts that a past relationship with an alleged victim constitutes a defense, while § 2(6) prevents this exception from being included within the Sexual Offences Bill. Such a concrete rule as Rule 412 would allow a perpetrator to claim a belief that the victim consented to sexual intercourse simply because the victim had consented in the past. Further, a husband accused of raping his wife would simply have to assert this defense as a justification for his crime, an action which would completely negate the impact of § 2(6).

The other two exceptions found in Rule 412 address valid concerns and should be written into the Sexual Offences Bill. One prevents a defendant's constitutional rights from being trammelled, while the other allows for evidence of an alleged victim's sexual history when such evidence is offered to prove that the accused was not the source of seminal fluid, injury, or other physical evidence. Both exceptions would encompass one of the purposes of the proposed Sexual Offences Bill: advocating for the rights of alleged perpetrators of sexual offences.²²⁹

C. *The Interplay Between HIV and rape*

The original draft of the Sexual Offences Bill submitted by the South African Law Commission to the Ministry of Justice obligated the state "to provide and bear the cost of the care and medical treatment and counseling for survivors of sexual violence who may have sustained injuries, psychological harm or been exposed to the risk of sexually transmitted infections as a result of a sexual offence."²³⁰ This provision would inscribe into law the South African Cabinet's commitment to provide antiretroviral drugs to survivors of sexual violence as part of a comprehensive package of support which would also include counseling, treatment for sexually transmitted infections, and testing for and prevention of HIV transmission as a result of rape.²³¹ The Preamble to the Sexual Offences Bill reads, in part:

IT IS THE PURPOSE of this Act to afford complainants of sexual offences the maximum and least traumatizing protection that the law can provide, to introduce measures which seek to enable the relevant

228. See FED. R. EVID. 412(b)(1)(B) ("[E]vidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent [is admissible].").

229. See *supra* Part III.A.

230. Submission, *supra* note 118.

231. *Id.*

organs of state to give full effect to the provisions of this Act and to strengthen the State's commitment to eradicate the pandemic of sexual offences committed in the Republic or elsewhere by its citizens.²³²

To effectively provide victims of sexual abuse with the maximum and least traumatizing protection, the government must commit itself to ensuring that every victim can receive post-exposure prophylaxis immediately upon his or her possible exposure to a life threatening infection, such as HIV or AIDS. These cocktail-like drugs are known to prevent HIV or AIDS infection if they are ingested immediately after a person's exposure to the disease. The Sexual Offences Bill must guarantee, though, that these preventive drugs will be readily available when they are needed.

Alleviating rape and sexual assault victims' fears of HIV transmission will encourage them to cooperate with the criminal justice system, thereby enabling the system to succeed in raising its conviction rate. As noted by the South African Law Commission, the guarantee of post-exposure prophylaxis that was originally written into the Sexual Offences Bill was intended "to encourage victims of violence to approach the system for assistance and to improve the experiences of those victims who choose to enter the system."²³³ Although the South African Government did make significant strides when it pledged to make treatment available, that pledge has no meaning without measures to ensure that it is carried out. Just as the U.S. Congress made the decision to include in the VAWA a conditional measure that requires states to either pay for victim rape kits, or suffer the consequences of grant money being withheld, South Africa needs to firmly commit itself to victims' rights by including in the Sexual Offences Bill a provision guaranteeing survivors of violent sexual assaults not only a ready supply of antiretroviral drugs, but also, the necessary psychological counseling.

VI. CONCLUSION

Commentators, the international community, and the South African Government itself, all recognize that the present rape and sexual offences laws in South Africa, both common law and act-based, have been highly ineffective in curbing the rape epidemic that currently afflicts the nation. The proposed Sexual Offences Bill could reverse this situation, but since its drafting, the bill has continued to sit before the South African Parliament, awaiting approval. This Note has proposed a number of revisions that should be implemented

232. Criminal Law (Sexual Offences) Amendment Bill pmbi.

233. Submission, *supra* note 118.

before the Parliament votes upon the bill. In addition, the Author has sought to convey the urgency that the current rape crisis demands.

The longer the South African Parliament continues to commit itself to inaction, the deeper the rape epidemic will root itself into the fabric of the nation. The legacy of apartheid serves as an all too vivid reminder of how deeply delayed eradication of a wrong can affect a nation. The deep wounds that continue to scar the South African nation have, in part, helped to produce the escalating rape phenomenon that afflicts South Africa's women and young girls. The Sexual Offences Bill can best be viewed as a bandage for this wound. When, and if, the South African Government finally takes the steps to approve the bill, that approval can only lead to South Africa breaking free from the chains that currently have it bound.

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